First Principles.

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In The News

October 31, 1975 Secretary of State Henry Kissinger told the House Intelligence Committee that during the six years he was National Security Advisor all covert operations had been approved personally by the President. The Committee also revealed that, under orders from Nixon over CIA objections, the CIA served as arms supplier to the Iraqui Kurds at the request of the Shah of Iran.

November 2-4, 1975 In a letter to the Senate Select Committee on Intelligence, President Ford requested that the Senate Report on *Alleged Assassination Plots Involving Foreign Leaders* be withheld from the public. Ford's letter stated that "publication will harm the national security and possibly endanger individuals." The Committee then voted to bring the matter before an executive session of the Senate; subsequently, the report was released on November 20, 1975. (See In The Congress, In The Literature and Point of View)

November 7, 1975 Witnesses testified at a Senate hearing that during the 1950's drug addicts at a federal rehabilitation center in Kentucky were "paid off" in narcotics for participating in CIA-funded experiments.

November 10, 1975 The Cook County Grand Jury released its report, "Improper Police Intelligence Activities." The Grand Jury found that the Chicago Police Department had both violated criminal law in its intelligence gathering activities and made indiscriminate use of undercover agents. This report will be the subject of the January issue of *First Principles.*

November 18, 1975 Senate Intelligence Committee investigators disclosed that the FBI tried to discredit the late Dr. Martin Luther King via undercover operations which included buggings and blackmail. Committee members were told that the late FBI director J. Edgar Hoover decided in 1961 to "smear King" and even decided on "a new national Negro leader to replace him." Other revelations included: Hoover's personal files were largely destroyed in 1972 either shortly before or after Hoover's death; and, obtaining NBC press credentials, the FBI conducted extensive spying of the Democratic National Convention at the request of the Johnson Administration.

November 18, 1975 A witness told the House Intelligence Committee that as an FBI informant he led a group of thirty antiwar demonstrators in a raid on the Camden, New Jersey draft board which resulted in arrests by federal agents. In other testimony, a retired FBI agent said he refused an assignment to obtain a handwriting sample of Andrew Young who was then a black Georgian candidate for Congress (he was elected in 1972 and re-elected last year) because it would be used for counterintelligence purposes.

November 19, 1975 Citing what they described as official sources, the *New York Times* reported that the $90 billion military budget approved for this year concealed within it $4 billion for the intelligence community's programs.

November 25, 1975 The Justice Department waived more than $23,000 in search fees for releasing under the Freedom of Information Act more than 30,000 pages of FBI material on the Rosenberg espionage conspiracy case.

It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to first principles.

THOMAS PAINE

In The Courts

August 22, 1975 *Concerned About Trident v. Schlesinger*, 400 F. Supp. 454 (D.D.C. 1975). Held that the Defense Department had complied with the requirements of the National Environmental Protection Act in building a support facility for Trident submarines at Bangor, Washington. *"Substantive decisions relating to the national defense and national security lie within that narrow band of matters wholly committed to official discretion both because of the delicate security issues they raise and the constitutional delegation of those concerns to the political departments of our government."* At 482 (Hart, J.).

November 4, 1975 *Federal Energy Administration v. Algonquin SNG, Inc.* No. 75-382, ____ U.S. ____, 44 LW 3257. The Supreme Court agreed to decide whether the President has the authority to impose a $2 a barrel fee on imported oil under the national security provision of the U.S. trade law. On August 11, a divided U.S. Court of Appeals held that the fees were a tariff and the Congress had not delegated that authority to the President.

November 6, 1975 *Halperin v. Colby*, #75-9676 (D.D.C.). The government filed a motion for summary judgment claiming the release of the detailed CIA budget would jeopardize the national security.

November 11, 1975 *Bynum v. United States #74-1445* and *Birnbaum v. United States*, #74-6411, ____ U.S. ____, 44 LW 3273. The Supreme Court declined to consider two wiretapping cases involving the extent to which law enforcement must 'minimize' the interception of communication. Justice William Brennan, joined by Justices Thurgood Marshall and William Douglas, wrote an angry dissent.

November 17, 1975 *Anonymous v. McCormick, Civ. Action #75-1918* (D.D.C.) Stating that the public's interest outweighed the interests of a CIA officer involved in alleged assassination attempts, Judge Gerhard Gesell ruled that the Senate Select Committee on Intelligence could print the officer's name in its final report; the Committee, however, then reversed itself and allowed the deletion.

November 24, 1975 *Kenyatta v. Kelley*, #71-2595 (E.D. Pa.) The ACLU filed a class action which is apparently the first civil suit against the FBI for damages challenging the Cointelpro-Black and Cointelpro-New Left operations.

November 25, 1975 *Chandler v. Helms*, #75-1773 (D.D.C.). In this ACLU class action suit directed at the CIA CHAOS program and NSA cable traffic surveillance, an amended complaint was filed adding present and former officials of the FBI, the Secret Service, the Drug Enforcement Agency, and the Defense Intelligence Agency. The class of plaintiffs was expanded to include those who were on watch lists supplied by these agencies to NSA.

In The Congress

November 20, 1975 Despite Executive objections, the Senate Select Committee on Intelligence released its report on *Alleged Assassination Plots Involving Foreign Leaders*. The report indicates U.S. involvement in assassination plots against Lumumba, Trujillo, and Castro, as well as encouraging the kidnapping of General Schneider in Chile. The report is discussed in Point of View, p. 20.

November 26, 1975 Representatives Robert W. Kastenmeier, Abner J. Mikva, and Don Edwards of the House Judiciary Committee introduced H.R. 10850, entitled the Federal Criminal Law Revision and Constitutional Rights Preservations Act of 1975 and which has been described as a "liberal alternative" to S.1, the Criminal Justice Reform Act of 1975. The House bill would simplify the complex federal criminal code without S.1's provisions endangering civil liberties. The bill has ACLU support.

In The Literature

Magazines

"Bringing the War Home," by Ron Ridenhour with Arthur Lubow, *New Times*, November 28, 1975, p. 18. The authors unravel one of the many subplans of the massive Army surveillance program "Garden Plot." Coded "Cable Splicer," the operation was a war game designed by the Pentagon to destroy domestic revolt by using military procedures.

"The Cult of Incompetence," by Morton H. Halperin, *The New Republic*, November 8, 1975, p. 11. Canvasses the controversy over Congressional Committee access to information and the right to release it, as well as the diversion of the House Intelligence Committee from its intended focus on the intelligence community's analytic failures.

Government Publications

Alleged Assassination Plots Involving Foreign Leaders, November 20, 1975. Report from the Senate Select Committee on Intelligence. (Government Printing Office No. 94-465: $3.25) See also In The Congress, and Point of View.

Law Review Articles

"Cloak and Ledger: Is CIA Funding Constitutional?" by Douglas P. Elliott, *Hastings Law Quarterly* (University of California) Vol. 2 (Summer, 1975). Argues for Congressional control over the CIA budget and its availability for public debate under clause 7 of Article 1, Section 9 of the U.S. Constitution.

Controlling the Intelligence Intelligence Agencies

A Report on the Conference Held November 3 and 4, 1975

Sponsored by the American Civil Liberties Union Foundation
Americans for Democratic Action
The Center for National Security Studies
The Committee for Public Justice
Common Cause
The Institute for Policy Studies
United Automobile Workers of America

BY CHRISTINE M. MARWICK

Last November 3rd and 4th, the Center for National Security Studies sponsored its second Washington conference on the conflicts that are inherent in trying to maintain both a democratic government and powerful secret intelligence agencies. The topic of last year's conference was the *Central Intelligence Agency and Covert Actions;* it dealt primarily with the ways in which the CIA's covert actions had been effectively removed from the control of law, and what this had meant for both the democratic process and American foreign policy.*

Since last year's conference, still more information about the intelligence community has escaped the secrecy system and been confirmed officially by the select committees of both houses of Congress and by the Rockefeller Commission report. What had before been merely rumor has become established fact, and the list of abuses continues to grow. Nor has the problem been limited to the CIA alone; the Center has published an exhaustive catalogue of the abuses of the intelligence community — which includes the FBI, the Secret Service, the IRS, military intelligence, and the National Security Agency, as well as the CIA — that were public knowledge as of this last October.

It has become increasingly clear that the system of secrecy which surrounds intelligence agencies has been used to protect abuses of power and illegal actions as effectively and with as much conviction as it protects the small amount of information which is actually vital to the national security. Some, not all, of their functions are necessary to the well-being of the nation, but the evidence is in that, lacking oversight, accountability, and strictly limited authority, a frightening range of their resources have been turned against the form of government which they were supposed to protect. Sen. Philip Hart of the Senate Select Committee on the Intelligence Agencies expressed the disillusionment which is spreading to continually wider sectors of the country:

> I've been told for years by . . . members of my own family that this is what the bureau has been doing all this time. I assured them . . . it just wasn't true. [But] what you have disclosed is a series of illegal actions intended to deny certain citizens their First Amendment rights — just like my children said.

In such a situation, it is agreed that something must be done — even supporters of the intelligence community agree that there must be changes, if only to regain consensus in support of their original functions. The dispute between critics and supporters of the intelligence community turns upon what specific changes should be made.

While last year's conference dealt with the ways in which the CIA has been an agency acting outside the rule of law, this year's conference proposed some of the questions which must be answered if the intelligence community as a whole is to be controlled by the rule of law — law established not by secret internal memoranda, but by the government of the people. In grappling with the issues, conference participants represented the full spectrum of opinion, ranging from supporters of the intelligence agencies to their critics. In this issue of *First Principles,* we will briefly report in turn on each of the questions discussed at the conference.

*The papers from this conference, as well as the discussion between CIA Director William Colby and the other participants, will be published this coming February by Grossman Publishers as *The CIA File*, edited by Robert L. Borosage and John Marks.

Parade of Disclosures

Is Espionage a Necessary Instrument for Intelligence Collection?

Speakers:
Ray S. Cline, *Formerly CIA Deputy Director for Intelligence and Director of the State Department Bureau of Intelligence and Research*
Herbert Scoville, *formerly Assistant Director for Scientific Intelligence, CIA*

As set out in the 1947 Act, the chief function of the Central Intelligence Agency was to be organizing and interpreting information from the many government agencies which collect intelligence data. The existence of a center for analyzing such data is not controversial. However, the CIA also has a covert division, with two generally intermingled branches: one for the covert collection of intelligence by espionage agents and the other for carrying out covert actions. The first question for conference discussion was, given the many alternative sources now available for collecting raw intelligence data, are espionage agents useful enough to justify the risks that they will be politically counterproductive?

The view of the majority in the intelligence community was presented by Ray Cline: human agents are necessary and useful. First, he noted operational advantages. Espionage includes a counter-espionage function, and it is also an effective liaison with the espionage systems of friendly governments. Cline noted however, in an oblique criticism of the current controversy over the CIA, that many governments have begun to doubt the confidentiality of information passed to the United States and become more cautious.

While acknowledging that the majority of intelligence data does come from either technological or open sources, Cline estimated that some 10% to 15% comes from espionage agents — a figure which Herbert Scoville found "exaggerated" — and this information from agents has been essential to flesh out and corroborate information gathered from the other sources. To support his case, Cline offered the agent reports that established the installation of Soviet offensive missiles in Cuba in in 1962. But this was also heatedly contested by Scoville; while there had been many reports of missiles, they were so generally unreliable that it was only in retrospect that the accurate reports could be separated from the unreliable. The technological sources, U-2 photographs, were the actual basis for decision-making.

Herbert Scoville found that while the United States needs economic, military, and political intelligence, espionage agents are far less valuable than open sources, overhead photography, and communications and electronic surveillance. Open sources clearly have provided the most useful information for economic intelligence and is of major importance with military and political matters. It is an ironic note on the reliability of the different source sthat in spite of technological information pointing to a Sino-Soviet rift, the rift was not believed until it was confirmed in open sources.

In gathering military intelligence, Scoville found agents have generally been inaccurate, misinformed, untrained, unreliable, and/or lacking in judgment. Even given a good agent, the information often cannot be used because acting on it would expose its source. There is also no guarantee that your agents are not working for more than one side or for their own political goals. Technological sources, then, provide the most reliable and usable source of military intelligence and it will also provide a great deal of political intelligence — photographs of troops and materiel provide a reliable indication of political intentions. While it is true that a reliable, highly placed agent could be extremely valuable in collecting political intelligence, such agents do not seem to exist in the USSR or China, the countries strong enough to threaten American security. Instead, the espionage "successes" have been mostly in small and weak Third World nations which offer no security threat that would justify their use as a necessity.

Unlike Cline and Scoville, who disagreed mainly on the relative value of espionage agents as compared to alternative sources, the other panelists were far more critical of using espionage as a technique; they challenged the usefulness of the information produced, the political risks, and whether it could be controlled.

First, the majority of the panelists found that espionage agents produce so little reliable intelligence that its value cannot outweigh the risks involved. Even William Colby's 1962 reports from Vietnam were extremely misleading and the possibility of planting a Kim Philby has been overtaken by counterespionage techniques.

Second, there are the serious political risks that Cline and Scoville did not attempt to consider. Espionage agents cannot realistically be separated from other kinds

of covert action; they are a political provocation, an act of limited warfare. Because so much of the intelligence that human agents are capable of collecting is in fact generated by the techniques of covert action, it is impossible to control espionage strictly enough to keep it from expanding into such limited warfare. As long as you retain any apparatus for covert agents — even if nominally only for simple intelligence collection — there will be a built-in incentive for operatives to use the secrecy surrounding espionage to cover what are actually covert actions.

Third, since it offers a combination of unreliable intelligence and political provocation, the decision to use espionage agents should be the result of a serious political decision. Yet the use of such agents has been determined internally by the CIA bureaucracy and without consulting either the National Security Council or the Forty Committee, which are supposed to function as presidential advisors on intelligence.

In all, while espionage does have some supporters, most of the panelists felt the risks to peace and to the political process far outweighed the value of human espionage compared to other sources — espionage has become an unnecessary instrument of intelligence collection.

These problems led into the conference's next topic: if the "simple" collection of intelligence by espionage agents has many liabilities and questionable advantages, what is the actual worth of covert actions, which are complex operations intended to influence or control foreign nations?

Should the United States Retain a Bureaucracy for Covert Action?

Speakers:

Arthur Jacobs, *retired career senior official, CIA*

Morton H. Halperin, *Director, Project on National Security and Civil Liberties; formerly Deputy Assistant Secretary of Defense and Senior Staff Member, National Security Council*

Speaking from his viewpoint as a career CIA official, Arthur Jacobs offered the classic arguments on behalf of covert action against other nations. He stated that covert action has been an historically legitimate and necessary instrument of foreign policy and cited the ample precedents for covert action techniques. However, given the differences of opinion about what the U.S. is and ought to be accomplishing abroad, many of the advantages of covert action which he listed have been treated by critics as reasons why such tactics should be abolished or drastically curtailed.

He listed a series of advantages — an arsenal of techniques which cannot be openly acknowledged — which follow from the fact that covert action offers "a methodology not limited by conventionality," but he did not reach the problem of how this circumvents the democratic process. Because there is no public commitment behind the covert action, a plausible denial can be issued if the cover for these methods is blown. Compared to overt techniques, then, covert action has also been a very inexpensive way of influencing foreign affairs and allows a crucial, peacekeeping alternative to military intervention.

Jacobs also introduced what was a recurrent theme among the intelligence community's supporters, who were generally more leery of diluting their effectiveness than of the seriousness of their abuses of discretion. He reasserted the claim that there are threats to the security of the United States which are so grave that they must be dealt with by methods which go outside the regular

channels of government. In such a world, abolishing covert action would be "tantamount to unilateral disarmament." Panelists however brought out in later discussion that, like espionage, covert action has been effective not against the countries which could actually threaten the United States, but against Third World nations.

But for Jacobs the central issue seemed to be that criticisms of the CIA were really misdirected criticisms of the nation's foreign policy, for which the CIA is not responsible. This implied two things: one, that the intelligence agencies are already controlled (by the policy makers), and two, that the CIA itself has not been one of the policy makers (as indeed it has). CIA critics saw neither implication as valid; this disagreement about policy-making and policy-makers was one of the recurrent cleavages between the supporters and the critics of the intelligence community.

For Morton Halperin, arguments against retaining a bureaucracy for covert action began with the reminder that if you take your own democratic system seriously you should not be putting the resources of powerful covert agencies against self-determination and behind oppressive governments. Aside from repeating the familiar motif that U.S. foreign policy is opposed to dictatorship and totalitarianism, this was an issue the supporters of the intelligence agencies steered away from.

Halperin also disagreed that covert action is economical and suggested that there are long-term costs which must also be counted. In the end, these costs have made covert action an extremely expensive proposition. For example, where supporters of covert action felt it is an advantage that the President can order covert actions which he could never openly approve and can then later issue "plausible denials," Halperin emphasized that this is a policy option designed to circumvent and undermine a democratic system, whether at home or abroad. And far from being minor efforts, covert actions carry risks which in effect make them major policy decisions, and as such they should be subjected to the rigors of public scrutiny and congressional debate. Instead of invoking the policy-making process to lift responsibility from the CIA, Halperin viewed the secret decision-making of covert actions as a serious distortion of that very policy-making process. Not only do the plans escape analysis by people without built-in biases (which would have avoided the Bay of Pigs fiasco), but when there is no way to know what the true policies of the President are, there is no way to cast an informed vote in elections. Either way, the constitutional system of checks and balances in the democratic process within the United States is effectively subverted.

Covert actions have proved that they come home in other ways; "plausible denials" were used with the same practiced facility to cover up domestic covert action programs, such as Operation CHAOS, as they were used to deny covert action in Chile and elsewhere.

Finally, while Jacobs offered us covert action as a flexible compromise solution to having to send in the Marines when the diplomats fail, Halperin viewed this as an oversimplification to avoid the real alternatives to covert action. It was not, for example, the CIA's cloak and dagger operation in Chile which did the most to undermine Allende, but rather the economic warfare which was carried out through regular channels of finance and commerce.

Halperin concluded by recommending that the basic tools of U.S. foreign policy be changed to conform with the values of our political system: there should be an absolute ban on assassination, on interference in any free elections in any country, and on covert actions which contradict the public policy of the government. This would call for legislation banning covert actions in general and stipulating broad consultations with Congress before taking the exceptional action — no more fait accomplis to be presented to Congress. Since merely having a covert operations staff creates the presumption that if-we-have-them-we-ought-to-use-them, Halperin felt the bureaucracy for covert operations itself, whether for covert action or for espionage, should be eliminated.

What Guidelines Should Be Placed Upon the CIA in the United States?

Speakers:
Ernest Gellhorn, *formerly Senior Counsel to the Rockefeller Commission*
Terry Lenzner, *formerly Assistant Chief Counsel, Senate Select Committee on Presidential Campaign Activities*

The Rockefeller Commission represented the presidential response to the public's demand to find out, after a generation of "plausible denials," in what ways the CIA's covert action techniques had been turned against Americans at home. *The Commission Report* (available from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402, Stock No. 041-015-00074-8, $2.85) contained some titillating new items about drug experiments on unsuspecting citizens, but for the most part it was official confirmation of what had already been made public through unofficial channels.

The Report also produced some thirty recommendations for "reform" of the CIA. Ernest Gellhorn proposed them to the conference as a viable set of guidelines to address not only the abuses of the CIA, but what the Commission saw as some of the causes of those abuses: the threat of the KGB, the vagueness of the CIA charter, the White House's temptation to use the CIA for its own purposes, the lack of built-in accountability, and the fact that the NSC authorizes rather than oversees the CIA.

Terry Lenzner's position fell somewhere between Gellhorn and most of the other panelists. He felt that the CIA should have to bear the burden of justifying its operations, but he also saw some justification for a domestic role. The Commission recommendations which Gellhorn supported would, for example, allow the Director of Central Intelligence to determine when it was necessary to protect the domestic facilities of the CIA; but Lenzner felt that, given its record of using that claim to cover virtually anything, the Agency should not be allowed to decide for itself. On the other hand, he saw no reason why the CIA should not keep files on citizens if the information was part of the public record. Congressional oversight was the primary tool which Lenzner supported for striking a balance between the needs of society both for the intelligence agencies and for protection from agency abuses.

While Gellhorn offered the Rockefeller Commission recommendations as a viable response to the problems, and while Lenzner faulted an occasional provision, most of the conference panelists found the recommendations a pale response to the problems of controlling the CIA domestically. Robert Borosage summarized these criticisms, noting that for the most part the recommendations merely said that the CIA should obey the law — a good idea but hardly a reform. It proposed no structural changes to insure agency compliance with the law; housecleaning was still to be an internal executive branch responsibility; and in spite of the fact that the executive branch has made no effort to prosecute anyone for the known CIA violations of the law, there was no recommendation for a special prosecutor from outside the executive branch. With a few largely cosmetic changes, the report was a "reiteration of CIA rationales."

The report recommended that the CIA be limited to only foreign intelligence activities — except where, by Executive Order, the President makes exceptions. Both Lenzner and Gellhorn agreed that making a distinction between foreign and domestic intelligence was unrealistic and could not be implemented, but the only safeguard which the Report proposed would be "coordination" with the FBI. Other panelists questioned why, given that the Director of Central Intelligence has come out strictly against any future CIA infiltration of domestic groups, the Commission elected to allow it as a matter of presidential discretion.

In a similar vein, the report recommended that the CIA not be allowed to collect domestic intelligence — but then went on to negate that recommendation with a list of exceptions: people who have been or are employed by the CIA, who pose a "threat" to CIA facilities or personnel (the classic, expandable rationale again), or who are "suspected" of espionage (no mention of Fourth Amendment standards of probable cause was included).

Another Commission recommendation was to upgrade the status of the Inspector General and the General Counsel of the CIA. The record, however, has shown that the IG has seen its role as identifying "potential flap activities" rather than correcting them; the General Counsel has seen its role as that of a "can-do" lawyer, telling its client, the CIA, how to extend its authority to cover such actions as the surveillance of peace groups ("to protect CIA buildings"). The Report did not include provisions which would redefine the roles of either office; it was merely an admonition to perform some sort of oversight function.

Finally, there was the Rockefeller Commission's endorsement of Colby's bill to make it a crime for employees and former employees to divulge classified information obtained during employment. This would seem to have the ominous intention of closing off the flow of leaks which have been the main source of information about past and future CIA abuses at home and abroad. It would be an additional step in legitimizing the system of secrecy which conceals the illegal activities of the intelligence community.

What Is the Role of Domestic Intelligence?

Speakers:
Mary C. Lawton, *Deputy Assistant Attorney General and Chairperson of the Justice Department Task Force on the FBI*
Ramsey Clark, *Former U.S. Attorney General*

Both Mary Lawton's and Ramsey Clark's proposals tried to reach toward the same conclusion — devising laws to control domestic intelligence investigations. Both agreed that there has been no formal, rational method of internal oversight for FBI functions from within the Department of Justice; as Ramsey Clark noted, Attorney's General spend less than 5% of their time on FBI matters. And Lawton and Clark agreed that the abuses, ranging from smear campaigns to filling make-work dossiers to meet office quotas, have created a pressing need for meaningful corrective guidance for investigations.

But Lawton's and Clark's starting points — what they each treated as the important issues that must be dealt with in reaching a resolution — were polar opposites. For Lawton, the starting point for determining the necessary laws was the existence of possible threats to the government. For Clark and most other panelists, the threat to political freedom was the first issue to be treated in drafting new laws.

Mary Lawton's discussion began by trying to define domestic intelligence gathering:

> [I]ntelligence gathering involves the collection of information about individuals, their activities, and their planned activities, for the purpose of preventing or preparing to deal with threats to fundamental government interests or to individuals whom the government has a special duty to protect . . .[it is] undertaken to thwart certain activities rather than to prosecute.

The government, she asserted, cannot wait for its own destruction and prosecute wrong-doers after it has been destroyed — some action is necessary before an actual insurrection can take place. She saw a distinction between initial probes and actual, full scale investigations, because without some intelligence gathering there is no way to determine whether the government is justified in acting; only if the probes were to reveal a serious threat should a full-scale investigation be warranted. She sees these conditions as offering some protection to political rights — for probes may well determine that a "foreign influence" on a group is merely rhetoric, and speech alone is not enough to warrant a full-scale investigation. While stating that the surveillance of legitimate political dissent should be prohibited, she did not attempt to draw clear lines between probes and actual surveillance. She also felt that some system of accountability for the FBI is necessary — executive branch "self-restraint," she agreed, is not enough, and there must be a mix of safeguards to prevent abuses.

For Lawton, then, the difficulty is in precisely formulating rational, limited, and constitutional guidelines for probes and investigations. There must be a clear statment of FBI objectives, functions, and scope of their investigations and probes; there must be decisions about who determines the shape of this intelligence gathering — the judge, the Attorney General, or the investigator? At what stage, for instance, should the Bureau go to the judiciary for approval — to check public sources about a person or a group?

Ramsey Clark approached the problem by noting that high sounding words about protecting the body politic often have little reality behind them:

> Self preservation is the first duty of government, but government of, by, and for the people can be destroyed and perish from this earth by excessive acts of government.

For Clark, control of the government was the essential — the authority to investigate must come not from the personal dislikes of government officials, but from law. Yet legislation on the techniques of investigation can be a non-solution. Congress has authorized wiretapping in the Omnibus Crime Control Act of 1968, but Clark cited

What Is the Role of Domestic Intelligence? (continued)

this Act as an example of how little effect laws can have. No court, it seems, has yet acquired the distinction of being the first to turn down an application for a warrant to wiretap or bug. Since warranting procedures do not work, Clark recommended the outlawing of all such electronic surveillance.

Clark's proposals hinged on legislation to reform investigative techniques and procedures. Congress, not the executive agencies, must authorize and prohibit specific types of conduct and delineate a middle area subject to executive regulation. These reforms would include:

No investigation or data accumulation should be allowed that is not part of a specific *criminal* investigation. This would outlaw the monitoring of public speeches and maintaining dossiers.

Information which is authorized to be collected must be subject to controls; criminal, civil, and injunctive sanctions should be set up to protect against the leaking of information that could threaten either the subject's reputation or a fair trail.

With the exception of on-going investigations, the subject should be able to see all data that the government has on him or her. Only in situations where the release might jeopardize someone's life would it be permissible to withhold information, and then only with judicial approval. Freeing investigatory files from some of the current exemptions under the Freedom of Information Act would make investigators accountable.

Finally, to guard against violations of investigative procedures, a review board with the power to compel witnesses and the release of information should be established. The members of the board should be from segments of society which are subjected to wrongful investigation.

To conference participants who had the documented history of government abuses as their focus, Mary Lawton's position seemed both unrealistic and unresponsive to the problems. Her apparent starting point in approaching investigative techniques — foreign domination — was challenged. Not even the KGB, it was asserted, has that potential. Lawton responded that her paper had used foreign domination merely as an example for discussion.

Panelists also felt that she was advocating policies which would end up authorizing the known abuses. She suggested that the government has an "obligation to act sooner than . . . probable cause to believe that a crime has been committed," which she called "affirmative action." Such a policy would in effect authorize preventive acton — the domestic equivalent of covert action — as long as it did not result in prosecutions reviewable under the Fourth Amendment.

The Justice Department's proposals to solve the problem of domestic intelligence abuses are awaiting the completion (in an estimated two years) of the report of the Task Force on the FBI which Lawton heads. This report is expected to include recommendations for controlling the initiation, reporting, duration, and techniques for investigations, as well as the dissemination of the information which is gathered.

But perhaps most basic difference between the Justice Department viewpoint and that of other panelists was expressed in an exchange between Mary Lawton and Morton Halperin:

> LAWTON: . . . If I had any real message at all. . . . (it was) only to think carefully in reacting to the past so that you do not go so far the other way as to wipe out what is legitimate.
> HALPERIN: I think everybody is against swinging too far in the other direction, but I think we would all feel somewhat more comfortable about that if the Justice Department showed some sign of swinging at all. . . . The Justice Department has not yet established the credibility of the notion that it is moving to do anything but try to hold the line against any kind of additional restraints being put on.

What Is the Proper Mix of Legislation and Executive Directives For Reforming the Intelligence Agencies?

Speakers:
Lawrence Houston, *Formerly General Counsel, CIA*
Barry Mahoney, *Formerly member of the Committee on Civil Rights of the Association of the Bar of the City of New York*

Former CIA General Counsel Lawrence Houston approached the problems of controlling that intelligence agency from the point of view that reflected relative satisfaction with the status quo. Aside from passing remarks about overclassification, much of Houston's thrust centered around the assertion that what are now called the "abuses of the intelligence agencies had been considered valid activities. Now that the CIA was on notice to change its interpretations and attitudes, it could be counted on to clean house without intrusive attention from outside; under Colby, the CIA moved to correct many of the mistakes of the past. He went on to make a series of observations and suggestions about legislation to deal with the CIA.

Houston noted that the National Security Act of 1947 did not use the word "foreign" in delimiting the CIA's functions; it had been removed in the drafting stage. If the Congress wants to hold the agency to a restrictive view of its functions, it will have to avoid skirting such issues. Houston also maintained that there is already an adquate system for congressional oversight of the CIA — the difficulty has been that Congress has been too busy to follow up its options for exercising its authority. Legislation could be enacted, however, which would specifically provide for the CIA reporting to Congress, which could then prescribe actions, including covert ones, which should be taken.

Houston also felt that new legislation should clarify DCI's authority; the Director's ability to protect sources and methods should be specified. Safeguards against abuse would remain internal and consist of a provision that he report violations to the Justice Department, which could then decide whether to take action. Although granting that overclassification is a problem. Houston also felt that an essential feature in any legislation revamping the CIA's authority would have to include criminal sanctions to deter leaks.

Barry Mahoney's approach to legislative reform was substantially more systematic. It would have to begin with determining not only what should be specifically authorized or prohibited, but what exceptions, if any, would be permitted in what special circumstances. A successful legislated design would have to make the agencies accountable for their actions while at the same time balancing those functions which were necessary.

The definition of the problem, then, was to control the exercise of unauthorized power by executive branch agencies. Reliance on self-policing by the executive branch agencies has not proved adequate. The current situation should be reversed, and the burden for justifying their programs should fall on the agencies, rather than on the public.

Designing accountability into a system which is authorized to employ secrecy for some legitimate reasons would be the crux of legislation. Oversight by Congress, Mahoney felt, would be an essential beginning but might ultimately be ineffective. Accountability, therefore, should have other systems, such as civil damages and criminal sanctions, shoring it up.

What Can Legislative Oversight Accomplish?

Speakers:
Representative Michael Harrington, *Democrat of Massachusetts*
William Miller, *Staff Director, Senate Intelligence Committee*
James Davidson, *Counsel, Senate Subcommittee on Intergovernmental Relations*
Paul Hoff, *Counsel, Senate Committee on Government Operations*

Even if it has not been honored in practice, it is publicly agreed that the intelligence agencies should be subject to the rule of law. But techniques and mechanisms to hold the agencies accountable for their actions have not yet developed. Thus far, the strongest sanction has been the threat of embarrassing disclosures. There have been some interim housecleaning reforms from within the executive branch and suggestions aplenty from outside, but no structural changes to produce genuine accountability have been inaugurated.

One of the remedies most frequently voiced has been the idea of congressional oversight of intelligence community activities — introducing congressional influence to balance the power of the executive branch and end the nearly total self-determination of the agencies. But there are serious questions of whether this could be worked out as a meaningful solution rather than a panacea.

Rep. Michael Harrington began the discussion with a pessimistic assessment of the prospects. He noted that in spite of publicity and scandal there have been no signs in the Congress of a dramatic change in the winds: in the House the Giamo bill to reveal the gross CIA budget figure was defeated by a margin of 2-1; the revelations about CIA involvement were met largely with non-response (aside from the efforts to censure Harrington for his part in making them public); and the executive branch continues to defy the authority of congressional inquiries. Given the "historically chummy circumstances" that develop between overseers and overseen, he doubted whether congressional oversight of the intelligence agencies would work any more effectively than has Armed Services Committee oversight of the military. The disclosures of systematic abuses and illegalities have scarcely slowed down the claims of prerogatives — the Director of Central Intelligence is asking Congress for a law punishing release of information by present or former government officials. Harrington concluded:

> So while I would welcome anything that would approach at least willingness to commit more resources and anything that would at all attempt to develop a separate and somewhat independent effort on the part of Congress to deal with the problem . . . I am *not* optimistic.

By contrast, the stances of the three speakers from congressional committee staffs ranged from skepticism to qualified optimism.

William Miller's position combined a certain skepticism about the probability of successful oversight with a measured sympathy for executive branch problems. He defined the issue as being an intermingling of abuses with lawful and necessary actions on the part of the intelligence agencies. For him, the major question is how to restore consensus that the agencies are both performing a vital function and under the control of law while doing it. Lacking effective oversight from outside, the burden has fallen entirely on the executive and therefore the abuses have arisen entirely from the executive. Like the other speakers he agreed that the secrecy system has been the major obstacle to a sharing of the burden.

Jim Davidson and Paul Hoff based their qualified optimism on their observation that things are changing. In setting up the intelligence agencies in 1947 and 1949, Congress had originally "carved itself out of any effective oversight role"; in response to the recent disclosures, however, the Senate now has three bills before it which deal with oversight and a resolution has been passed providing for full consideration by a March 1, 1976 deadline. Davidson also saw the Hughes and Ryan Amendments (which prohibit spending any money for covert actions, excluding covert intelligence collection, *unless* the President determines that the activities are in the interest of the national security and reports of covert actions are made to House and Senate committees) as a

sign pointing to Congress' willingness to take new responsibility. But other panelists interpreted this as leading only to congressional complicity in covert action decision making — the provision for presidential discretion leaves a loophole large enough to move a small army through it.

While it was agreed by both critics and supporters of the intelligence agencies that congressional oversight is necessary, it was unclear what form a meaningful system of congressional oversight could take. While a joint committee on the model of the Joint Atomic Energy Committee would speak with a "single strong voice," it would be more easily coopted by the intelligence community. Those "chummy circumstances" that Harrington mentioned might be weakened by rotating committee membership and having two competitive oversight committees might keep each other awake. There is also the problem of deciding the scope of oversight committee responsibility — there are some 70 federal agencies carrying on some kind of surveillance or investigative function; oversight effectiveness will be diluted unless a clear priority is given to controlling the national intelligence agencies.

Considering Lawrence Houston's assertion that we already have congressional (although admittedly less than effective) oversight, changes must be made to give Congress more leverage. A basis for real power must be established. The power of the purse — the ability to control rather than rubber stamp expenditures — is essential to any meaningful balance of power.

One point on which even moderate critics of the agencies were agreed was that the classification system must be reformed. Without absolute access to information congressional oversight is meaningless. It was suggested, for instance, that the oversight committee(s) have an assured, rountinized, and mandatory reporting system which is not dependent on scandals leaking out or Congress authorizing a special investigation.

Citing recent leaks, panelists in support of the intelligence agencies were highly skeptical about Congress' ability to keep national security information secret. Harrington pointed out, however that the executive branch already does a generous share of leaking, and the discussion treated executive branch concern about leaks as something of a shibboleth. The executive agencies actively indulge in the creative leaking of classified information slanted in support of their programs — especially as budget time approaches. Such calculated agency leaks are highly unreliable, often consisting of either misinformation or disinformation. There was an additional point made about the mythology behind covert operations: while it has now "leaked" that the United States is currently and "covertly" giving money to the Socialist Party in Portugal and intervening in Angola, there is no sign that this has changed these programs. Apparently, such actions do not have to be kept secret (and covert) in order to be carried out.

Although the executive branch has had exclusive control of the classification system (with the exception of the Freedom of Information Act which Congress passed a year ago, see the November issue of *First Principles*), there is nothing in the constitutional framework to keep Congress from changing the standards for classification from being based on Executive Order to being established by legislation.

In the last analysis, most panelists were also doubtful about the value of oversight. To actually legislate tightly formulated guidelines for the intelligence agencies will be controversial and difficult; adopting oversight as a panacea is a relatively easy pseudo-solution. Without tremendous public attention, oversight is virtually impossible. While it is useful that congressional attention is at last being focussed on the intelligence agencies, eventually interest will die down. If by that time a legislated system of criminal and civil sanctions which encourage revealing illegalities and holding the intelligence agencies accountable for their actions has been put into effect, the task of seeing that the agencies perform their duly authorized functions — and only their authorized functions — will be safeguarded from several directions at once. It is to these options that we now turn.

Should "Whistleblowers in National Intelligence Agencies Be Protected?

Speaker:
Ralph Stavins, *Fellow, Institute for Policy Studies*
Respondents:
Ernest Lefever, *Senior Fellow, Brookings Institution*
Tom Sussman, *Chief Council, Senate Subcommittee on Administrative Practices and Procedures.*

Ralph Stavins began the discussion by presenting the case for encouraging whistleblowers in a system which has had so many documented criminal abuses of power. Stavins noted that the intelligence agency system has been directly or indirectly responsible for assassination, violation of treaties, torture, and the systematic violation of political freedom at home and abroad; that the President's loyalty has been to the intelligence community instead of the Constitution; and that together the agencies and the executive have systematically deceived the courts and the Congress. Against this pattern of uncontrolled abuses, the number one obstacle to free wheeling criminal activity has been the whistleblowing federal employee. The administration response, predictably enough, perhaps, has been to try to close off the whistleblowing, which renders them accountable in spite of the secrecy system.

Ernest Lefever approached the question from an ideological viewpoint that is the polar opposite of Stavins'. Feeling that "the misdeeds of the intelligence community have been exaggerated by the hard core critics," he did not deal with their documented criminal activities. He emphasized instead the necessity of authority and rules. In a position parallel to Arthur Jacobs (in the discussion on the need for covert action) Lefever felt that challenging the abuses of the law was in reality a cover for challenging the nation's foreign policy. He did not reach the question, however, of whether a foreign policy which must apparently be secretly decided and secretly implemented through illegal tactics has, in fact, been properly arrived at. Nor did he address the way that his view of the facts of foreign policy conflicted with those of most of the other panelists; he felt, for example, that the US intervention in Chile was directed against totalitarianism and for democracy.

Lefever did agree that overclassification is a fact, but he felt that only ranking officials — and never whistleblowers — should have the authority to declassify information. "The upper eschelons have authority — they're in policy positions." Panelists noted these upper echelons practiced a double standard and violate security when it suits their purposes, as when the government released the only genuinely top secret information in the Pentagon Papers.

Lefever discussed two kinds of whistleblowers: the responsible ones and the irresponsible ones. Not attempting to deny that there are some improprieties which should be revealed, he felt that by definition all "responsible" whistleblowers carefully follow the rules, observe all regulations, and honor all pledges about classified information. They may either stay on the job or resign, but they move their complaint quietly through the ranks of their superiors and finally to the relevant congressional committee. Tom Sussman noted, however, that sometimes the most promising of channels do not work; Daniel Ellsberg gave a copy of the Pentagon Papers to Sen. Fulbright, in whose safe they collected dust.

Lefever listed Daniel Ellsberg, Philip Agee, Victor Marchetti, and Rep. Michael Harrington as examples of irresponsible whistleblowers, who have indulged an "exhibitionistic conscience." Other panelists criticized lumping together three such disparate cases, feeling it could only mean that he simply did not understand the problem. John Marks, Marchetti's co-author on *The CIA and the Cult of Intelligence*, noted that in Marchetti's case all the rules laid down by the courts had in fact been followed, there was no illegal action, and the result set the dubious precedent of being the first politically censored book in the history of the United States. Marks also noted that in Harrington's case, the alternative to whistleblowing was tantamount to suborning perjury.

Lefever did feel that legislation should be enacted to "curtail irresponsible whistleblowers and to encourage responsible ones." Such a law would make it a criminal offense for any government employee or former employee to reveal classified information to an unauthorized person — in other words, S.1. He did not, however, clarify how this would encourage responsible whistleblowers.

According to Tom Sussman, the regular administrative channels for releasing information should be short-circuited when dealing with questions of official dishonesty. He would define responsible whistleblowing not as following rules but as releasing information that the public has an interest in knowing. Congress, he felt, should make it clear that responsible whistleblowing is an honorable thing and institute a system of protections by allowing whistleblowers to go to court to remedy retaliation or harassment by their agencies.

A Program for Criminal Responsibility

Speaker:
Nathan Lewin, *formerly Deputy Assistant Attorney General*
Respondents:
Hope Eastman, *Attorney, American Civil Liberties Union*
Philip Heymann, *Former Associate Prosecutor, Watergate Special Prosecution Force*

The last several years have produced an almost continuous flow of information about systematic and illegal abuses of power by not just one intelligence agency but all of them. National consensus has eroded, criticism from outside the agencies has crescendoed, and whistleblowers from within are continuing to reveal the dubious workings of the executive agencies once thought of as being beyond reproach. In spite of this and in spite of the abundant documentation of illegal programs, no one beyond the Watergate crew, the Plumbers, and the immediate Nixon White House has been the subject of so much as a grand jury investigation, let alone an actual prosecution. Yet none of the panelists representing the intelligence community argued for establishing an expressed or de facto official immunity. There seems to be an emerging consensus that if we are serious about having a government of laws rather than of men, government officials must be subject not only to the same laws that private citizens are, but there must also be a system of laws to deter them from abusing the power that private citizens do not have.

Nathan Lewin drew up a proposed bill, the Abuse of Authority Act, which he felt would put on the books a clear statutory statement of criminal responsibility. In pertinent part, it read:

> Whoever, being an officer or employee of any department or agency of the United States, knowingly and willfully engages in conduct which exceeds the constitutional, statutory or regulatory authority of such department or agency for the actual or ostensible purpose of gathering intelligence for or in behalf of the United States shall be fined not more than $1000, or imprisoned for not more than one year, or both.

Lewis also suggested that might be a good idea to include a specific rejection of the Nuremberg ("just following orders") defense. His statute was designed to supplement current criminal provisions and reach everyone in the government. One advantage that he saw for it was that it does not require proof of harm to individual rights, but only of the abuse of authority. He also saw it as working effectively as a deterrent; the abuses in the intelligence agencies have been the result of conscious policy decisions, and this law, with its proviso for "willful" abuses, would prompt disclosure much earlier, if only by prompting officials to seek legal advice.

Other panelists found the statute seriously flawed in a number of ways. Hope Eastman felt that it did not give clear notice of what is criminal and therefore would not pass the void-for-vagueness test of constitutionality. She proposed instead a series of criminal statutes that would specify in reasonably thorough detail what kinds of conduct are in fact prohibited. David Phillips agreed, saying that from his viewpoint as a former CIA agent, Congress owed it to its operatives to specify clearly what is illegal and to give them clear notice of when they can and should act as "responsible whistleblowers." Philip Heymann faulted the Lewin statute for trying to encompass too much. In one statute, it tries to cover individual rights, the massive federal filing system, and the control of powerful secret agencies — it is simply too ambitious to cover so much with so little. But on Lewin's side, it was asserted not only that his Abuses of Authority statute is no more vague than the civil rights laws, but that it may in fact be a delusion that you can draft this kind of statute with sufficient precision and clarity.

Still, the Lewin statute does not come directly to grips with what Eastman called the national security override. The law's lack of specificity, especially considering the reluctance of the Justice Department to prosecute, allows officials the possibility of claiming that "I thought this was an exception." Lewin and Heymann, however, did feel that its very generality did treat this problem; if the Abuses Act were on the books and the government wanted to tap the Cuban mission to the United States, Congress would have to pass a law to make it legal.

There is also the question of whether a statute should allow the defense in court that the official was acting "in good faith and reasonable belief," that his or her action was legal. Lewin felt that absolute criminal liability, (which is the case in "ordinary" or non-official crime — you either did or did not do the deed) was too high a

A Program for Criminal Responsibility (continued)

price to exact from public servants; on the other hand, he felt a good faith defense should not be available in civil suits for harm actually done. Other panelists felt that the government should instead absorb some of the liability — in both criminal and civil actions — by taking up the cost of the legal fees of officials charged under the act. Considering that the cost of a legal defense today will bankrupt all but the wealthy — even where the defendants plead guilty or are acquitted — this seemed an equitable response to the burdens of office: "Civil servants are entitled to some kind of protection and I would rather give them a good lawyer than a good faith defense." This would not reduce the deterrence in the statute; officials would be on notice that they had better give careful attention to the legal implications of their acts.

But none of this treats the central problem: there already are criminal statutes on the books under which intelligence agency officials could be prosecuted, but no prosecutions are under way. Unless these people get a fair trail or strict provisions for ensuring prosecution are written into the new statute, another criminal statute will have no credibility and no deterrent.

In large part the difficulty has been that the Director of Central Intelligence, for example, has preferred to let people go free rather than to reveal classified information which would come up in a trial. Yet to say that people should reveal illegalities in the intelligence agencies without revealing classified information is a contradiction in its own terms. The Justice Department's prosecutorial discretion thus far has been to honor DCI's request not to prosecute. Eastman suggested creating a special prosecutor, one who would be outside the usual executive branch system of loyalties. It could be either a permanent position or one which would be triggered into existence in specified situations.

Another unresolved question was how to develop a system for investigating abuses. Obviously, expecting one intelligence agency to investigate another, such as asking the FBI to investigate the CIA, would not be promising. Effective criminal investigations in the intelligence agencies calls for structural innovations, perhaps insuring that lower echelon people would have free access to a specific person in Congress or in the Justice Department to whom they could report possible violations.

There is also the question of whether, especially given prosecutorial problems, criminal sanctions for the abuse of authority by officials (as opposed to committing crimes under other federal statutes) are necessary or desirable. Perhaps a law which instead required the firing of errant officials would be more likely to be enforced and more effective.

But in the last analysis, even if a criminal prosecution is initiated, it does nothing to compensate victims for the damage to individual rights. A refined system for civil damages is also necessary.

A Program for Civil Liability

Speaker:
John Shattuck, *National Staff Counsel, ACLU*
Respondent:
Rhonda Copelon, *Staff Counsel, Center for Constitutional Rights*

Without any criminal prosecutions pending for the known abuses of authority by the intelligence community, civil litigation is currently the only effective form of accountability.

Rhonda Copelon noted that civil remedies can be used to counter the abuses of authority in three different areas: it acts as a credible deterrent, the lawsuit provides compensation for violation of protected rights, and the suit can make public the details of a system of abuses that the government had been trying to keep buried under classification stamps and prosecutorial discretion.

However, the path to a successful civil suit has been a hard one. Only since the revelations following Watergate have courts been willing to treat seriously the possible fact of executive branch abuses of power. There are a number of changes which Congress could make to remedy the procedural problems which the civil litigant faces in court and strengthen civil suits as a bulwark against illegal actions.

The Supreme Court made clear in the Steel Seizure case (*Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952) that Congress has the power to limit the power of the executive; Congress can specify both what actions are legal and what the trial procedures should be. The following analysis of problems in civil litigation and their remedies was drawn largely from John Shattuck's presentation.

Jurisdiction. The first hurdle is establishing that there is a statutory basis giving the court the power to hear the case. Under current statutes, a plaintiff can sue in federal court if the damages amount to at least $10,000; the obvious problem of course is establishing a monetary value for an intangible such as the chilling effect of surveillance on free speech. There is also a federal statute "providing for the protection of civil rights," but the constitutional doctrine under the First and Fourth Amendments is not always clear enough to establish jurisdiction.

Legislation could clear away these jurisdictional ambiguities about the citizen's rights in civil litigation. Any legislative package to control the intelligence agencies should contain provisions which establish a clear jurisdictional basis for enforcing constitutional rights against the agencies. The wiretapping provisions in the Omnibus Crime Control Act of 1968 currently do this, and as a result the *Halperin v. Kissinger* lawsuit has so far been successful in its motions for discovery.

Justiciability and standing. Litigating against secret government practices is full of catch-22 pitfalls. How do you establish a class action if the members of the class are known only to the government? And in *Laird v. Tatum*, 408 U.S. 1 (1972) the court found the case nonjusticiable, because plaintiffs had failed to prove that military surveillance had in fact injured them; if you go to court for redress, it proves your First Amendment rights have not been chilled.

Discovery. Since the intelligence agencies are the only side with control of the data, the government has the tactical advantage in the discovery process and can use a number of techniques which make a suit too espensive to litigate. They are able, for instance, to claim information is privileged under national security or investigatory criteria. A tactic known as "informal" executive privilege consists of withholding information from the court without making a formal claim that the information is in fact privileged. Another tactic consists of circumventing the adversary proceedings by having an *ex parte* proceeding in the secrecy of the judge's chambers with only the government presenting its side. If there is to be an adversary proceeding, the plaintiff's lawyers must be given enough information in order to litigate. Statutes should establish sanctions for erroneous claims of privilege and other tactics which are used to slow down the litigation process.

There is also a long history of the government misrepresenting the facts of a case. In a number of cases the facts have turned around 180 degrees from the government's original assertions.

Generally, the information which is finally given to the plaintiff is placed under a protective order—none of the information, even that indicating

A Program for Civil Liability (continued)

clearly illegal behavior, can be released and the public has no way of learning what their officials have been doing. A statute to control the intelligence agencies should specify that the government cannot make a claim of secrecy which would cover illegal conduct with a protective order.

Defenses. There is also a need for a new statutory system to cope with the special defenses which are now available to defendants. First is the problem of sovereign immunity—you cannot sue the government unless a statute gives you specific authorization. This is important because often the errant officials may be bankrupted by the legal proceedings and there is no way for successful defendants to collect damages or to recoup the costs of a long and expensive court battle. Defendants also claim "official immunity" or that they acted in "good faith and reasonable belief" that their actions were legal—which means that the government is subject to a far easier standard than what applies to ordinary citizens in civil suits or criminal proceedings. Again, a statutory system stating precisely what would be prohibited is needed so that these defenses can be eliminated. Lastly, there is the statute of limitations problem. Illegal actions of secret agencies often do not become part of the public record until long after they occurred. Legislation should specify that the statute of limitations begins in these cases only after the individual has discovered his or her rights have been violated.

Relief. Rhonda Copelon suggested that a statute should provide that if a litigant survives a government motion to dismiss there is clearly a real issue at stake in the case, and, at the court's discretion, the government could be required to pick up some or all of the costs of litigation. As it stands now however, the reverse is true. 18 U.S.C. Sec. 1331(b) provides that a court can access attorney's fees and court costs against a successful *plaintiff* who recovers less than $10,000. In addition to money damages, there should be provisions for injunctive relief to enforce any rights or duties established by statute—such as the expungement of records in the intelligence agencies.

The Next Issue of First Principles: Red Squads

The conference on *Controlling the Intelligence Agencies* which we have covered in this issue dealt only with the problem of controlling the federal intelligence agencies. The disclosure of abuses by the federal intelligence system has gotten the largest share of public attention, but it has been only part of the problem. The systematic violation of protected political rights by government has not been an exclusively federal prerogative. Across the country, local police forces developed "Red Squads" for the surveillance and disruption of political activities which were guaranteed in the Bill of Rights. In the next issue of *First Principles* we will extend our view beyond the federal government and cover the Cook County Grand Jury's report on "Improper Police Activities." This report summarizes the findings of their lengthy investigation: the Chicago police practiced the systematic violation of the law in order to harass, incite, and prosecute groups outside the mainstream of "national security" political thinking.

(Continued from page 20)

by refusing to have anything to do with plans for a coup. The CIA plotted to have hime kidnapped while it preached to the military the need to act. In the end Schneider and later Allende were killed by military leaders who took our advice and now run a brutal dictatorship.

In Cuba the United States sought repeatedly to assassinate Castro—in spite of intelligence reports which said that his removal from office would make no difference since his followers would carry on and the regime could be overthrown only by massive American military intervention. Such intervention was contemplated both before and after the Bay of Pigs; the assassination of Castro seen as one necessary action.

This dismal record of subverting democracy abroad stands in contrast to everything that the American revolution and the Republic stand for: intervention in the internal affairs of others; advocating in Chile that the military subvert the constitution and the principle of civilian supremacy; seeking in Chile and the Congo to subvert the free will of parliaments; conniving in the Congo to deny Lumumba the right of free speech for fear that others would choose to follow him.

What Castro, Lumumba, and Allende had in common was charisma, an ability to inspire others to believe that fundamental change was possible, and a trait they shared with Martin Luther King. The fundamental values of the Republic were no more respected at home than abroad. The FBI made King an enemy at home as the Agency made the others enemies abroad because it was feared that the ability to move people would be put at the service of policies that the intelligence agencies and our Presidents feared.

Indeed the techniques used at home and abroad were remarkably similar: forged documents, efforts to embarrass leaders before their families and followers, promotion of violence, and blackmail threats. The FBI sent Martin Luther King an anonymous letter telling him in effect that if he did not commit suicide before he received the Nobel Peace Prize, his private life would be spread before the news media. The Chilean military were told that if they did not prevent Allende from coming to power, all military aid would be suspended and the United States would do all within its power "to condemn Chile and the Chileans to utmost deprivation and poverty." Both threats were carried out.

We need to make many concrete changes in the way our intelligence agencies operate and to bring under control the process of defining our enemies and what we should do against them. I have sketched my own views in both the October issue of *First Principles* and in the conference reported on in this issue.

But we need also to change the symbols which guide our society. One place to begin that process would be to change the name of the massive new FBI building in Washington so that it is no longer a tribute to the Director who subverted the rights of so many Americans, but becomes a memorial to one who stood for so much that is great in America and who was subject to outrageous persecution by the Bureau—Martin Luther King.

Point Of View (continued)

Point Of View

Who Are Our Enemies?

MORTON H. HALPERIN

In its report on assassinations and its hearings on the FBI Cointelpro operation, the Church Committee has provided portraits of five men who our Presidents and intelligence agencies declared secret enemies: Patrice Lumumba of the Congo, Salvador Allende and General Rene Schneider of Chile, Fidel Castro of Cuba, and Martin Luther King. To understand United States foreign policy, we need to take a hard look at what these men stood for, and why and how we opposed them. I can only suggest here some beginning thoughts in that inquiry.

President Eisenhower told the National Security Council that he was prepared to risk war with the Soviet Union to get rid of Lumumba. According to the Church Committee report, the Congolese leader "was viewed with alarm by United States policymakers because of what they perceived as his magnetic public appeal and his leanings toward the Soviet Union." The plot to assassinate him in the summer of 1960 was part of an effort to persuade the Congolese that Lumumba had to be permanently removed from the scene. Lumumba was then out of office and under the protection of UN officials. The CIA feared that if he were permitted to speak publicly his "spell binding" rhetoric would lead the Congolese people to follow him: phrased in CIA cabalese, "Lumumba talent and dynamism appear overriding factor." At the same time that it was plotting Lumumba's assassination, the Agency was desperately trying to keep the Congolese parliament from meeting for fear that it would vote him back into office.

A decade later the Nixon Administration faced a similar problem in Chile. If it met, the Chilean parliament would elect Salvador Allende President on the basis of his plurality in a free election. America's allies, the Christian Democrats, could have prevented Allende's accession to power simply by violating their political tradition and voting for his right wing opponent, but they refused to do so. And although the CIA had concluded that the United States had no vital interests in Chile, Nixon had determined that Allende must be stopped by any means. Only the Nixon Administration saw Allende as so evil as to justify any means to keep him from power. To accomplish this, the American government promoted a military coup, a difficult task because the Chilean military were dedicated to constitutional procedures and to civilian supremacy. In particular, General Schneider, the Commander-in-Chief of the Army, made himself an enemy of the United States

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Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.

JAMES MADISON TO THOMAS JEFFERSON,
MAY 13, 1798